

**KEVIN ZIMMERMAN**  
Claimant

**RUSKIN MFG. TOMKINS INDUSTRIES**  
Respondent

**INS. CO. STATE OF PENNSYLVANIA**  
Insurance Carrier

The issues for Board review include whether timely notice, written claim, and application for hearing were made. Specifically, whether claimant is an incapacitated person within the purview of K.S.A. 44-509, which would toll the time limitation provisions for notice, written claim and filing an application for hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant began his employment as a welder with respondent in 1985. In the fall of 1996 claimant began receiving treatment for his back and neck pain. His condition continued to worsen until he left his employment because the pain prevented him from working.

Claimant testified that on July 23, 1997, he told his supervisor that he could no longer work because his work activities were causing his back and neck pain. George Russell Severt, claimant's supervisor, agreed that on July 23, 1997, he had a discussion with claimant about claimant's back and neck pain. Mr. Severt testified that claimant told him he could not say if the pain was due to an injury at work or at home. Mr. Severt prepared an accident report after the discussion. Claimant never returned to work for respondent.

Claimant sought medical treatment for his back and neck but also experienced psychological problems. Claimant was hospitalized in November 1997 because of his psychological condition and on January 5, 1998, he attempted suicide. Following that episode claimant received ongoing psychiatric treatment. Claimant ultimately had neck surgery in June 1998.

Claimant later applied for and was placed on Social Security disability retroactive to November 1997. Claimant's wife was appointed representative payee because claimant was unable to manage his money. Claimant's wife testified that Mr. Zimmerman was able to make decisions for himself until November 1997 when he was hospitalized for his psychological condition.

Patty Williams, a case manager at Four County Mental Health Center, testified that she first started seeing claimant in January 1998. She testified that from when she initially began to see claimant he has been unable to manage his own affairs because his moods vacillated and he could not make rational decisions. Dr. V.J. Reddy, a psychiatrist, in a letter dated September 10, 2001, noted claimant had been his patient since 1998 and was being treated for bipolar disorder. The doctor noted:

Over the last years, since he has been under my treatment, he has continued to be unstable, labile, and has not been able to function adequately. Because of his very tenuous mental status and frequent episodes of instability, he has not been able to

make rational legal or business decisions, on a consistent basis, since I started treating him initially.<sup>1</sup>

Written claim was made and the application for hearing was filed on September 20, 2001.

Following a preliminary hearing on December 5, 2001, the ALJ ordered an independent medical evaluation of claimant by R.E. Schulman, Ph.D., to determine claimant's mental capacity and causation of psychological problems. Dr. Schulman concluded claimant has bipolar disorder with severe depression and anxiety. He further noted claimant is disabled and not able to effectively communicate with others, does not always understand communications directed to him and cannot always care for himself. Dr. Schulman concluded claimant's work injuries accelerated and aggravated his depression and in spite of his pre-existing depression and suicide attempts, claimant was functional until his injuries at work.

In Kansas, an injured worker must satisfy the trinity of timely notice of accident, timely written claim and timely application for hearing in order to maintain the claim for workers compensation benefits. No proceedings for benefits shall be maintainable if the injured worker fails to timely satisfy the requirements of any one of the three.

Initially, the injured worker must provide the employer with the time, place and particulars of the accident within 10 days.<sup>2</sup> The injured worker must next provide the employer with a written claim for compensation within 200 days of the accident or the date of last payment of compensation.<sup>3</sup> Lastly, the injured worker must file an application for hearing with the Division of Workers Compensation within 3 years of the date of the accident or within 2 years of the last payment of compensation. Again, the failure to meet the time requirements of any of the three statutes prevents an injured worker from proceeding to obtain workers compensation benefits.

Respondent argues claimant failed to provide timely notice, written claim and application for hearing. Respondent argues the claimant demonstrated, by his deposition testimony, a capacity to remember and present evidence sufficient to prosecute the claim, that he had filed accident reports in the past and his wife noted he was capable of making his own decisions until November 1997.

Claimant testified he advised his supervisor that work was causing his back and neck pain. While the supervisor recalls the discussion he notes claimant was unsure

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<sup>1</sup> P.H. Trans., Cl. Ex. 2.

<sup>2</sup> K.S.A. 44-520.

<sup>3</sup> K.S.A. 44-520a.

whether his pain was caused by activities at work or home. Nonetheless, an accident report was prepared by the supervisor. The Board concludes claimant gave timely notice on July 23, 1997, of his accident.

The Workers Compensation Act requires an injured worker to serve written claim upon his or her employer within 200 days of the accident or within 200 days of the last date that compensation is provided, whichever is later. The Act also provides that the 200-day period is extended to one year when the employer fails to file an accident report with the Division of Workers Compensation.<sup>4</sup> The Act also requires that an application for hearing be filed with the office of the Director within three years of the date of accident or two years from the last payment of compensation, whichever is later.

But the Workers Compensation Act also provides that its time limitations do not apply as long as an incapacitated person or a minor has no guardian or conservator. K.S.A. 44-509(a) reads:

In case an injured workman is an incapacitated person or a minor, or when death results from an injury in case any of his dependents, as herein defined, is an incapacitated person 'or a minor' at the time when any right, privilege, or election accrues to him under the workmen's compensation act, his guardian or conservator may on his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in the workmen's compensation act provided for, shall run, so long as such incapacitated person or minor has no guardian or conservator.

The Act does not define incapacitated but K.S.A. 77-201, which addresses the rules of statutory construction, states that an incapacitated person is a disabled person as defined in K.S.A. 59-3002, as amended. K.S.A. 59-3002(a) provides:

'Disabled person' means any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or, except for reason of indigency [sic], to meet essential requirements for such person's physical health or safety, or both. A person shall not be considered to be disabled or to lack capacity to meet the essential requirements for physical health or safety for the sole reason such person relies upon or is being furnished treatment by spiritual means through prayer, in lieu of medical treatment, in accordance with the tenets and practices of a recognized church or religious denomination of which such person is a member or adherent.

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<sup>4</sup> See K.S.A. 44-557 (Furse 1993) and *Childress v. Childress Painting Co.*, 226 Kan. 251, 597 P.2d 637 (1979).

In this case, the uncontroverted medical evidence supports a finding that claimant is an incapacitated person. Accordingly, the time limitations in K.S.A. 44-520a and 44-534 were tolled.

The evidence at this juncture of the proceedings indicates claimant was able to manage his affairs until November 1997. Assuming claimant did not become incapacitated until November 30, 1997, the time limitations in K.S.A. 44-520a and K.S.A. 44-534 had not expired at that point in time and became tolled by his subsequent incapacity. The Board rejects the argument that one must be incapacitated on the date of accident before incapacity will stop the running of time. The Board concludes that the Legislature intended that no period of time under the Workers Compensation Act should run when an injured worker is incapacitated whenever that incapacity occurs.

The Board affirms the ALJ's determination claimant is an incapacitated person and K.S.A. 44-509 tolled the limitation of time for making written claim and filing an application for hearing. The Board finds claimant gave timely notice. For the foregoing reasons, the ALJ's Order should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated June 3, 2002, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2002.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Garry Lassman, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation